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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 695

Petition Not Printed
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JOE ROBERT COLLIER,

Petitioner,

—v.—

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER JOE ROBERT COLLIER

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8 *Moore's Federal Practice* ¶37.02 (2d ed., 1965 revision) 8

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BRIEF FOR PETITIONER JOE ROBERT COLLIER

Opinion Below

The opinions and orders of the courts below (R. 7-8, 13, 18-19, 23, 25, 34-35) are unreported.

Jurisdiction

The judgment of the court of appeals was entered June 16, 1965 (R. 34). Petitioner, without the assistance of counsel, filed a typewritten petition for a writ of mandamus in this Court on June 24, 1965 (R. 28-29). The Court treated the petition as a petition for a writ of certiorari, and granted certiorari, with leave to proceed in forma pauperis, on October 25, 1965 (R. 36). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Rules Involved

The relevant provisions of the Federal Rules of Criminal Procedure (18 U.S.C. Appendix) are set forth in the Appendix, *infra*.

Question Presented

Whether the time within which to take an appeal under Rule 37(a)(2) of the Federal Rules of Criminal Procedure is enlarged by a motion for a new trial which is filed within the 10-day period prescribed by Rule 37(a)(2) but which is not timely under Rule 33.

Statement

On March 24, 1965, petitioner was convicted by a jury of a violation of the White Slave Act (18 U.S.C. Sec. 2421) in the United States District Court for the Western District of Kentucky (R. 7, 4). On that same day, March 24, judgment of conviction was entered, and petitioner was sentenced to imprisonment and committed to the custody of the Attorney General (R. 7-8). Nine days thereafter, on April 2, 1965, petitioner filed a motion for a new trial, predicated upon grounds other than newly discovered evidence (R. 11-12). The motion was denied by the District Court on April 5, 1965 (R. 13).[1] Seven days thereafter, on April 12, 1965, petitioner filed a notice of appeal (R. 15-16).[2]

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[1] On April 2, 1965 petitioner also filed a motion for substitution of counsel which was sustained by the District Court on April 5, 1965 (R. 9, 13).

[2] On April 9, 1965, petitioner filed a motion in arrest of judgment, and, on April 12, 1965, petitioner filed a motion requesting that service of sentence be withheld pending appeal and for release on

On June 16, 1965, the court below dismissed the appeal as untimely (R. 34-35). The court below based its conclusion upon the ground that the motion for a new trial was not timely under Rule 33 of the Federal Rules of Criminal Procedure, and that the motion in arrest of judgment was not timely under Rule 34 (R. 35).

Summary of Argument

Under the plain and express terms of Rule 37(a)(2) the appeal was timely filed. Rule 37(a)(2) provides that an appeal may be taken within 10 days of judgment, unless within that 10-day period a motion for a new trial has been filed, in which case the appeal may be taken within 10 days of the denial of the motion. Rule 37(a)(2) does not require such a motion to be timely under Rule 33 in order to start a new 10-day period running. Rule 37(a)(2) should be read simply, in a straightforward way. This promotes simplicity and fairness, as required by Rule 2. This also permits motions for new trial to be filed, where a question of timeliness exists under Rule 33, without undue and unnecessary peril to the defendant's right to appeal. Furthermore, Rule 37(a)(2) should be construed so as to permit direct appeals in preference to collateral attack, a sound policy which has been endorsed by this Court. Conversely, the administration of Rule 33 is in no way harmed, or even affected by a straightforward application of the Rule. The decision of the court below creates an unwarranted com-

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bond (R. 14, 17). On April 15, 1965, these motions were denied by the District Court (R. 18-19). Petitioner also filed, on May 5, 1965, a motion to suspend sentence, or, in the alternative, to credit petitioner for time during which he was confined in Jefferson County Jail (R. 22). This motion was denied by the District Court on May 11, 1965 (R. 23).

plication not contained in the Rule, unduly restricts direct appeals, and creates an injustice to those relying on the explicit terms of the Rule.

ARGUMENT

1. The Plain Meaning of Rule 37(a)(2), Its Background, and Sound Policy Compel the Conclusion That the Appeal Was Timely Filed.

Rule 37(a)(2) provides in relevant part that:

> An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion.

In construing this language, "We look first to the face of the statute" (*Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)), for the "[m]ost relevant [legislative material], of course, is the very language in which [the legislator] has expressed its policy and from which the Court must extract the meaning most appropriate" (*Carpenters Local 1976* v. *Labor Board*, 357 U.S. 93, 100 (1958)). The language of the Rule is clear and unambiguous. It provides that an appeal may be taken within 10 days of entry of judgment, but that if within that 10-day period a motion for a new trial (or in arrest of judgment) is made, then in such event the appeal may be taken within 10 days following the denial of such motion. The Rule contains no qualifications, restrictions, provisos, or otherwise limiting language. It does not incorporate any of its sister rules, including Rule 33 and its separate time limits, by reference

or inference or implication, direct or otherwise. As stated by the Court of Appeals for the Tenth Circuit in *Lujan* v. *United States,* 204 F. 2d 171, 172 (10th Cir. 1953), Rule 37(a)(2) "fails to contain any language indicating even by clear implication that it is limited to a motion seasonably filed under Rule 33". The appeal in the instant case conformed explicitly to the express requirements of Rule 37(a)(2). Thus, the motion for a new trial was made "within 10 days after entry of the judgment" and the appeal was taken "within 10 days after entry of the order denying the motion". There is nothing in Rule 37(a)(2) which requires or suggests that the motion for a new trial to which it refers must meet the separate and additional time requirements of Rule 33 in order to start the running of a new 10-day period. And, the language of Rule 37(a)(2) being plain and unambiguous, and conveying a clear and definite meaning, there is no occasion to strain for an ambiguity which does not appear. Had the framers of the Rules sought to impose additional restrictions or qualifications upon the time limits of Rule 37(a)(2) it could easily have utilized appropriate language to accomplish such a result. It did not do so.

Buttressing the precise, unambiguous language of Rule 37(a)(2), and the direct interpretation stated above, is the clear mandate expressed in Rule 2. It is there provided that "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." It is thus stated that primary attention in the interpretation of the Rules shall be directed toward "simplicity" and "fairness". As this Court stated in *United*

States v. *Debrow*, 346 U.S. 374, 376 (1953), "The Federal Rules of Criminal Procedure were designed to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure." Rule 2 was inserted "to make sure that the Rules would be construed in the liberal spirit contemplated by their framers." *United States* v. *Young*, 14 F.R.D. 406 (D.C. D.C. 1953) (Holtzoff, J.), rev'd on grounds not relevant here, 214 F. 2d 232 (D.C. Cir. 1954). To strain for ambiguities which do not appear in Rule 37(a)(2), to add a complicating technicality as does the interpretation of the court below, accomplishes neither "simplicity" nor "fairness".

Our analysis of Rule 37(a)(2) is further confirmed by its legislative evolution. The predecessor of Rule 37(a)(2) was Rule III of the Criminal Appeals Rules of 1933. Under Rule II(2) of those Rules, motions for new trials were required to be made within three days after a verdict or finding of guilt. Rule III required that an appeal be taken within five days after entry of judgment "except that where a motion for a new trial has been made *within the time specified* in subdivision (2) of Rule II, the appeal must be taken within five (5) days after entry of the order denying the motion." (Emphasis added.) Thus, the predecessor to Rule 37(a)(2), unlike the present Rule 37(a)(2), specifically provided that the motion for a new trial must have been timely under the separate rule regarding such motions in order to start the running of a new five-day period for the taking of an appeal. The omission of any such restrictive provision in the present Rule 37(a)(2) is of itself compelling evidence of the intention to avoid and eliminate any such qualification.

In addition, and even more significantly, the preliminary draft of the present Rule 37(a)(2) specifically contained a similar qualification. The initially proposed rule read in relevant part as follows:

> (2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial *has been made seasonably,* an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion . . . "[3]

Thus, the proposed rule would have provided, and if adopted would only then have supported the view of the court below, that a new 10-day period in which an appeal might be taken would run only if a motion for a new trial had been made "seasonably". The rejection of this restriction was presumably deliberate, particularly in the light of its concomitant deletion of the "within the time specified in subdivision (2) of Rule II" restriction contained in the predecessor Rule III, *supra.*

Neither the language of the Rules nor their background in any way suggests an interpretation of Rule 37(a)(2) which would restrict the right of appeal beyond those restrictions already contained therein. On the contrary, where the Rule does not foreclose it (which is certainly the case here), the Rule should be construed so as to permit direct

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[3] Federal Rules of Criminal Procedure, Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office 1943, Appeal Rule 35(a)(2), p. 152. "While these notes are not authoritative, they are somewhat analogous to a Congressional Committee Report in determining the intentions of the framers of the Rules." *United States* v. *Mihalopoulous,* 228 F. Supp. 994, 1002 (D.C. D.C. 1964) (Holtzoff, *J.*).

appeals rather than to leave the defendant to the chances of collateral proceedings to obtain review of a judgment. "It is more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding." *Bartone* v. *United States,* 375 U.S. 52, 54 (1963). This construction comports with the purpose stated in Rule 2 that the Rules are designed to promote simplicity of procedure and to eliminate expense and delay. Consistent with that purpose, it also avoids the restrictive scope of review which obtains in collateral proceedings. Indeed, the "statistical probability of error alone suggests that a defendant's right of appeal should be jealously preserved." 8 *Moore's Federal Practice* 37-4, ¶37.02 (2d ed., 1965 revision). "Foreclosing direct appeal in some cases, moreover, has undoubtedly increased collateral attacks on convictions, a result which burdens the district courts as well as the courts of appeals." 8 *Moore's Federal Practice* 37-7, ¶37.02 (2d ed., 1965 revision). Both this Court and the courts of appeal have applied this approach in a variety of situations so as not to restrict unnecessarily the right of appeal. See e.g. *Bartone* v. *United States, supra; Corey* v. *United States,* 375 U.S. 169 (1963); *Fallen* v. *United States,* 378 U.S. 139 (1964); *Calland* v. *United States,* 323 F. 2d 405 (7 Cir. 1963); and *Boruff* v. *United States,* 310 F. 2d 918 (5 Cir. 1962).

2. No Valid Reason Exists to Restrict Rule 37(a)(2) by Implication.

As stated above, a direct, understandable and unencumbered interpretation of Rule 37(a)(2) is compelled not only by the clear and unambiguous language of the Rule itself, but also by its history and purpose. To so read the Rule

yields neither absurd nor meaningless consequences, nor does it in any way interfere with the effective administration of the procedural rules. Were there a countervailing policy of substantial import to be balanced against the plain meaning of Rule 37(a)(2), the situation might be otherwise. But no such balancing problem is involved. The court below is troubled by the apparent anomaly that motions for a new trial under Rule 33 are to be made within 5 days of verdict.[4] The grounds apparently relied upon by the court below and its sister courts reaching the same conclusion do not warrant the limitation of Rule 37(a)(2).

First, it is said that "a paper, even though denominated a motion for a new trial, which is not filed within the time specified in Rule 33" (*United States* v. *Bertone*, 249 F. 2d 156, 158; see also *United States* v. *DeRocco*, 320 F. 2d 58, 60) is not actually a motion for a new trial and cannot therefore serve to enlarge the time for appeal under Rule 37(a)(2). The short answer to this semantic approach[5] is that the "paper" is obviously a motion for a new trial,

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[4] The court followed its decision in *United States* v. *DeRocco*, 320 F. 2d 58 (1963). The Courts of Appeals for the Third and Fifth Circuits have reached the same conclusion as the court below. *United States* v. *Bertone*, 249 F. 2d 156 (3d Cir. 1957); *Lott* v. *United States*, 280 F. 2d 24 (5th Cir. 1960), *rev'd. on other grounds*, 367 U.S. 421 (1961). So also has the Court of Appeals for the Ninth Circuit in dicta; *Marion* v. *United States*, 171 F. 2d 185 (9th Cir. 1949), *Pugh* v. *United States*, 197 F. 2d 509 (9th Cir. 1952), and apparently the Court of Appeals for the Eighth Circuit in an unclear ruling, *Godwin* v. *United States*, 185 F. 2d 411 (8th Cir. 1950). The Court of Appeals for the Tenth Circuit has reached a contrary conclusion, *Lujan* v. *United States*, 204 F. 2d 171 (10th Cir. 1953), *Smith* v. *United States*, 273 F. 2d 462 (10th Cir. 1959). This Court withheld decision on the point in *Lott, supra*.

[5] This subtlety of reasoning is surely a "technicality" which the Rules "were designed to eliminate" (*Debrow* v. *United States, supra*).

but it is simply one which is untimely under Rule 33. Secondly, it is said that Rule 37(a)(2) must be read in light of Rule 33 to avoid the elimination of the 5-day time limit contained in Rule 33. See e.g. *Bertone, supra,* 249 F. 2d at 158-159.[6] To read Rule 37(a)(2) so as to permit enlargement of the time for an appeal, in the event of both timely and untimely motions for a new trial made within the 10-day period, in no way undermines the time limits contained in Rule 33. Rather, when a motion for a new trial is untimely under Rule 33, the result is simply that the trial court is unable to grant the motion, regardless of the effect of that motion upon the separate time limits of Rule 37(a)(2) for taking an appeal.

The restrictive interpretation of Rule 37(a)(2), urged by the Government in the court below (R. 32-33), fails to take into account the mandate of Rule 2 and the policy favoring direct appeals. In fact, the cases supporting the Government's position do not discuss either of these considerations. Instead, the policy said to be served is that of harmonizing Rules 33 and 37. Harmonizing the Rules in question has but theoretical desirability; it should not serve to defeat the weightier consideration favoring a less restrictive reading of Rule 37. If it is believed that there is an anomaly between the time periods of Rules 33 and 37 (a)(2) which must be resolved in the interest of theoretical

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[6] The reasoning of *Bertone* on this point is legalistic. (1) "Rule 37(a)(2) reads in terms of the denial of the motions for a new trial to which it refers." (2) "Denial presupposes consideration of the merits." (3) "[M]otions for a new trial which are untimely filed may not be considered on their merits . . . ." Therefore (4) "if the defendant is right any motion for a new trial which is filed within 10 days after entry of judgment is timely and must be considered . . . on its merits." *Bertone,* 249 F. 2d at 158-159. Cf. *Lott* v. *United States,* 367 U.S. 421, 425 (1961), describing this reasoning as "the legalisms of the Government's . . . argument."

consistency, then the proper procedure to accomplish this result is by amendment of the Rules. Indeed, as the Government's memorandum in opposition to certiorari in the instant case points out (pp. 2-3):

> The Committee on Rules of Practice and Procedure of the Judicial Conference, in proposing Uniform Rules of Federal Appellate Procedure, has made it clear that only timely motions for a new trial or in arrest of judgment will extend the time for filing a notice of appeal. (See Preliminary Draft, March 1964, Rule 4(d); pp. 7, 8).

At any rate, as we have said, we see no meaningful conflict between Rules 33 and 37(a)(2). To permit an otherwise untimely motion to enlarge the time for taking an appeal does no harm to the administration of Rule 33, and, at the same time, affirmatively serves to promote the interests of simplicity, fairness, and availability of direct appeals. There is thus no reason to deviate, as did the court below, from the plain language of Rule 37(a)(2).

3. Granting Additional Time to Appeal in the Case of an Untimely Motion for a New Trial Meets a Practical Procedural Need.

It may be felt that granting additional appeal time in the event of an untimely new trial motion is a pointless artificiality. To the contrary, this provision serves a valid purpose.

Computation of time limits under Rules 33 and 34 is not without difficulties. It is first necessary to determine the date of the "verdict or finding of guilty" (in the case of

Rule 33) or of the "determination of guilt" (in the case of Rule 34). Even upon mature reflection (the time for which is not always available to the trial lawyer), these dates have proved troublesome to ascertain. *Lott* v. *United States*, 367 U.S. 421; *Godwin* v. *United States*, 185 F. 2d 411, 413 (erroneous belief of trial judge); *Pugh* v. *United States*, 197 F. 2d 509, 511-512 (time computation of trial judge, held to be erroneous). In addition, under Rule 45(a) intermediate Sundays and holidays are excluded in computing the 5-day period, but are not excluded in computing the 10-day period.

Thus an appellant may well feel that his motion is in time under Rules 33 or 34, when in fact it is not. If he proceeds to file such a motion within 10 days of judgment of conviction no serious delay is encountered. In all fairness, he should then have the additional 10-day period following denial of the motion in which to appeal, whether or not the motion was in fact timely under Rule 33. Otherwise, the lawyer must proceed at his peril, even when within the 10-day period, where a question exists as to the timeliness of the motion. Surely these few days are a small concession to the interest of fairness, where the entire right of appeal is at stake.[7]

At the same time, there is scarcely any temptation to file a motion for a new trial or in arrest of judgment which is intentionally late under Rules 33 or 34 in order to obtain more time in which to appeal. It is simpler by far to file a notice of appeal than to file a motion under Rules 33 or 34. Cases of late filing of motions under Rules 33 or 34 will

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[7] A timely new trial motion grants the trial court an opportunity to correct its own errors at once and is not to be discouraged by needless perils.

almost inevitably be mistakes of lawyers, not devices to defer the necessity of filing a notice of appeal.

These practical considerations may or may not have occurred to the draftsmen of Rule 37(a)(2). In any event they are reasonable, and promote the objectives expressed in Rule 2, especially that of fairness. When taken with the considerations discussed earlier, any need to restrict that Rule by implication completely disappears.

Conclusion

It is respectfully submitted that the order of the Court below should be reversed and the case remanded for consideration of the appeal on its merits.

DEAN E. DENLINGER
Attorney for Petitioner

January, 1966

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APPENDIX

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APPENDIX

The relevant provisions of the Federal Rules of Criminal Procedure (18 U.S.C., Appendix) are as follows:

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 2. Purpose and Construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 33. New Trial.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

Rule 37. Taking Appeal; and Petition for Writ of Certiorari.

(a) *Taking Appeal to a Court of Appeals.*

* * * * *

(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment

of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

CRIMINAL APPEALS RULES OF 1933[8]

II. *Motions.* * * *

(2) Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt. * * *

III. *Appeals.* An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II, the appeal may be taken within five (5) days after entry of the order denying the motion. * * *

[8] These Rules are set forth at 292 U.S. 661.

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